WONG YUEN HOCK

v.

BAN HIN LEE BANK BHD & ANOR

COURT OF APPEAL, KUALA LUMPUR
DENIS ONG JCA
MOHD NOOR AHMAD JCA
ALAUDDIN MOHD SHERIFF JCA
[CIVIL APPEAL NO: W-02-420-1998]
18 JULY 2002

CIVIL PROCEDURE: *Parties - Addition of new party - Whether intervener properly added as a party to proceedings - Whether intervener entitled to seek order for possession of land and damages - Whether intervener a bona fide purchaser for value without notice*

The defendant ('the chargor') charged a piece of his land to the plaintiff ('the bank') as security for a loan given to a company. The company defaulted in the repayment of the loan and the bank obtained, pursuant to foreclosure proceedings, an order for the sale of the land. The land was subsequently sold to the 2nd respondent who paid the purchase price in full. Thereafter, the chargor applied to set aside the sale of the land whilst the 2nd respondent applied for leave to intervene in the chargor's application. The learned judge granted the 2nd respondent leave to intervene but dismissed the chargor's application to set aside the sale. The chargor, however, continued to occupy the land and the 2nd respondent (hereinafter 'the intervener') sought and obtained, *inter alia*, an order for the possession of the land and damages. The chargor appealed and his principal contentions were: (i) that, after obtaining leave to intervene, the intervener had failed to take steps to have himself added as a party to the proceedings, either as a co-plaintiff or a co-defendant; (ii) that no pleadings were ever served by the intervener on the chargor; and (iii) that leave to intervene was granted to the intervener only for the specific purpose of opposing the chargor's application to set aside the sale of the land and nothing else.

Held:
Per Alauddin Mohd Sheriff JCA

[1] The intervener had properly applied for and obtained leave to intervene in **and be added as a party** to the proceedings. He was, in substance, a party to the proceedings and was, therefore, entitled to seek the order for possession and damages which he eventually obtained. (pp 102 g-h & 103 h)

[2] The intervener was a *bona fide* purchaser without notice. He had paid the purchase price in full and the land had also been registered in his name. He was, therefore, entitled to take possession of the land. (p 103 f)

[Appeal of appellant/defendant/chargor dismissed.]

*[**Bahasa Malaysia** Translation Of Headnote*

Defendan ('penggadai') telah menggadai tanahnya kepada plaintif ('bank') sebagai jaminan kepada suatu pinjaman yang diberikan kepada sebuah syarikat. Syarikat gagal membayar balik, dan ekoran suatu prosiding halang-tebus, bank memperolehi perintah untuk menjual tanah. Tanah kemudian dijual kepada responden kedua yang membayar sepenuhnya harga jualan. Berikutnya penggadai memohon untuk mengenepikan penjualan tanah, manakala responden kedua memohon untuk mencelah dalam permohonan tersebut. Hakim bijaksana membenarkan permohonan responden kedua untuk mencelah, tetapi menolak permohonan penggadai untuk mengenepikan penjualan. Penggadai, bagaimanapun, terus menduduki tanah, dan oleh kerana itu, responden kedua ('pencelah') memohon dan memperoleh, antara lain, perintah pemilikan tanah dan gantirugi. Penggadai merayu dan berhujah secara pentingnya: (i) bahawa pencelah, setelah memperoleh kebenaran untuk mencelah, gagal menamakan dirinya sebagai pihak kepada prosiding, sama ada sebagai plaintif bersama atau defendan bersama; (ii) bahawa pencelah gagal menyerahkan apa-apa pliding ke atasnya; dan (iii) bahawa kebenaran untuk mencelah adalah semata-mata bagi membolehkan pencelah menentang permohonan penggadai untuk mengenepikan penjualan, dan tidak untuk tujuan-tujuan lain.

Diputuskan:
Oleh Alauddin Mohd Sheriff HMR

[1] Pencelah telah secara teratur memohon dan memperoleh kebenaran untuk mencelah serta untuk dijadikan pihak kepada prosiding. Beliau sesungguhnya adalah pihak kepada prosiding, dan dengan itu berhak untuk mendapatkan perintah pemilikan serta gantirugi sepertimana yang beliau perolehi.

[2] Pencelah adalah seorang pembeli bona fide tanpa notis. Beliau telah membayar sepenuhnya harga jualan dan tanah juga telah didaftarkan atas namanya. Beliau, dengan itu, berhak untuk mendapat pemilikan tanah tersebut.

Rayuan perayu/defendan/penggadai ditolak.]

Case(s) referred to:
Aik Ming (M) Sdn Bhd v. Chang Chin Chuan [1995] 3 CLJ 639 ***(dist)***
M & J Frozen Food Sdn Bhd & Anor v. Siland Sdn Bhd & Anor [1994] 2 CLJ 15 ***(refd)***

Legislation referred to:
Courts of Judicature Act 1964, s. 72

For the appellant - Tan Soo Leong; M/s SL Tan & Assoc
For the 1st respondent - Cindy Goh; M/s Cheang & Ariff
For the 2nd respondent - Lim Chee Wee; M/s Skrine & Co

[Appeal from High Court, Kuala Lumpur; Originating Summons No: OSF/OS/AE38-275-1994]

Reported by Gan Peng Chiang

JUDGMENT

Alauddin Mohd Sheriff JCA:
In this appeal before us, the appellant is the registered proprietor of land held under H.S. (D) 891 and H.S. (D) 2039, P.T. No. 8944 and P.T. No. 10103, Mukim Sungei Buloh, Daerah Petaling (the said land).

On 27 June 1994 the appellant charged the said land to the first respondent as a security for a loan granted to Good Rich Corporation Sdn. Bhd. (the borrower).

The borrower defaulted in paying the loan and the first respondent then commenced foreclosure proceedings and obtained an order for sale in respect of the said land. After several unsuccessful attempts to auction the said land, they were eventually sold to the second respondent (the intervener) on 8 April 1996 for the purchase price of RM300,000. After the full purchase price was paid, the land was subsequently registered in the name of the second respondent on 30 July 1997.

On 22 June 1996 the appellant applied to the High Court to set aside the auction sale held on 8 April 1996. At the same time the second respondent applied for leave to intervene in the said application. The learned judge granted the second respondent leave to intervene and be added as an intervener and dismissed the appellant's application to set aside the auction sale.

Since the appellant was still occupying the said land after his application was dismissed by the High Court, the second respondent, as intervener, had on 7 August 1997 filed an application by way of summons-in-chambers (encl. 77) seeking amongst others declarations, possession of the said land injunction, damages and costs against the appellant. By way of another application (encl. 83) the appellant applied for stay of the order of giving possession of the said land to the second respondent pending the disposal of his appeal.

Both encls. 77 and 83 were heard together by the learned judge. The learned judge decided to grant the second respondent's application (encl. 77) and dismissed the appellant's application (encl. 83). Hence, the present appeal before us in respect of encl. 77 only.

Before us learned counsel for the appellant argued that after the second respondent had obtained leave to intervene he had failed to take steps to make himself a party to the action either as co-plaintiff or co-defendant. Consequently, no pleadings were served on the appellant by the second respondent. Learned counsel for the appellant contended that leave to intervene granted to the second respondent was only specifically for the purpose of his intervention or opposition to the appellant's application to set aside the auction sale and nothing more.

In support of his contention learned counsel for the appellant cited the case of *Aik Ming (M) Sdn. Bhd. v. Chang Chin Chuan* [1995] 3 CLJ 639. In that case the Court of Appeal had occasion to consider the status of an intervener. Delivering the judgment of the court (at p. 656) the learned Gopal Sri Ram JCA had this to say:

> Notwithstanding all this, the intervener was not joined as a party to the action. Even when the intervention took place for the limited purpose of setting aside the injunction, no steps were taken by the plaintiff to add the intervener as a co-defendant to the action. Neither did the intervener apply to have itself added as a party.
>
> There was no pleading delivered by the plaintiffs against the intervener. Neither was there any pleading delivered by the intervener. All that was placed on record was the affidavit of Dato' Tan filed in support of the application to set aside the injunction. In short, every fundamental rule of practice and procedure had been flouted.

Having carefully read and examined the judgment in *Aik Ming* (above), we must say, with the greatest of respect to learned counsel for the appellant, that the facts in Aik Ming are very much distinguishable with the facts of the instant appeal.

As we have alluded to earlier the intervener in the instant appeal had properly applied for and obtained leave to intervene and be added as a party though only as 'an intervener' which to our mind is a mistake in respect of nomenclature only. In substance he is a party to the proceedings (see s. 72 of Courts of Judicature Act 1964).

Further, in his affidavit supporting the said application for leave this is what the intervener said at para 7:

> Oleh kerana saya adalah pemilik sah hartanah tersebut, saya adalah suatu pihak yang berkepentingan dalam prosiding ini. Kini saya memohon kepada Mahkamah Mulia ini untuk keizinan mencelah dalam prosiding ini oleh kerana saya akan terjejas oleh mana-mana perintah yang mungkin dibuat oleh Mahkamah Mulia ini berhubung dengan perkara ini dan **Defendan hendaklah menjadikan saya suatu pihak kepada permohonan ini pertama-tamanya**. (emphasis added).

In our opinion, what the intervener had stated in his affidavit (above) is very much consistent with the observations made by the learned Gopal Sri Ram in *Aik Ming* (above) where his lordship stated (at p. 656):

> What ought to have been done is this. When the intervener was given notice of the suit and of the injunction obtained therein, its solicitors ought to have written to the plaintiff's solicitors putting them to their elections: that they either add their client as a co-defendant to the action and amend their statement of claim to raise a case against the intervener or that an application in that behalf would be made by the intervener. If the plaintiffs had demurred upon that request, then the application for intervention could and should have been made. In any event, when the application came to be made, there ought to have been a prayer in the summons asking for an order that this intervener be added as a co-defendant and for directions on the delivery of pleadings by the parties including a direction requiring the plaintiffs to plead their case against the added co-defendant. No difficulty on this last requirement would have been encountered because there were the necessary averments in paras 60, 61 and 64 of the statement of claim.

Before concluding we may add that as the learned judge had rightly decided that the second respondent was a *bona fide* purchaser without notice and had paid the purchase price in full, in our judgment, he certainly was entitled to possession of the said land. In this respect we need only refer to the case of *M&J Frozen Food Sdn Bhd. & Anor v. Siland Sdn. Bhd. & Anor* [1994] 2 CLJ 15 where it was held by the then Supreme Court that in an auction, the vendor is regarded as having divested himself of all the beneficial interest in his land and vested it in the purchaser only at the time when the memorandum of transfer is executed and the purchase money is paid in full.

Having considered the facts and circumstances of this appeal we are of the view that the second respondent, as an intervener, had successfully made himself a party to this action and was therefore entitled to make the application seeking the reliefs aforesaid.

Having given this appeal our utmost consideration we are unanimous that this appeal cannot succeed.

The appeal is dismissed with costs to the second respondent only. Deposit towards account of taxed costs.

My learned brothers Denis Ong Jiew Fook and Mohd. Noor Hj. Ahmad JJCA had seen this judgment in draft and had expressed their agreement with it.